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IN THE

Supreme Court of the United States

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October Term, 1943.

No. 336

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

HEARST PUBLICATIONS, INCORPORATED,

Respondent.

PETITION FOR REHEARING.

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Hearst Publications, Incorporated, respondent herein (Case No. 336), respectfully petitions for a rehearing upon the following grounds:

1. The Effect of the Court's Decision Is to Leave the Standard Prescribed by Congress in the National Labor Relations Act Vague and Indefinite, Thus Permitting the Exercise of Law-making Power by an Administrative Body in Violation of the Separation of Powers Doctrine.

The separation of powers doctrine[1] forbids one department of our national government from exercising the constitutional powers of another department. Under the

[1] *Springer v. Philippine Islands*, 277 U. S. 189, 201; *Panama Refining Co. v. Ryan*, 293 U. S. 388, 421.

Constitution the lawmaking power is vested in Congress alone and may not be exercised by another department. But Congress may delegate to an executive officer or board, as its agent, the duty of "filling up the details" of Congressional legislation.[2]

However, valid delegation must prescribe a *standard* for the guidance and limitation of the executive officer or board.[3] Delegation without such *standard* would permit the executive officer or board to legislate in the broad sense contrary to the constitutional scheme vesting in Congress the lawmaking power.[4]

Likewise, delegation without a *definite and certain standard* would permit the executive officer or board to legislate in the broad sense contrary to such constitutional scheme. Hence, an act of Congress which prescribes an indefinite or uncertain standard will be held unconstitutional.[5]

It is respectfully urged that the Court's decision leaves the meaning of the *standard* set by Congress in the National Labor Relations Act (i. e., the word "employee")

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[2]*United States v. Grimaud*, 220 U. S. 506, 517.

[3]As said by Mr. Justice Reed in *United States v. Rock Royal Co-operative, Inc.*, 307 U. S. 533, 574:

> "In dealing with legislation involving questions of economic adjustment, each enactment must be considered to determine whether it states the purpose which the Congress seeks to accomplish *and the standards by which that purpose is to be worked out with sufficient exactness to enable those affected to understand these limits.*"

[4]*Panama Refining Co. v. Ryan*, 293 U. S. 388, 414, 418, 420, 421, is an outstanding authority on this point. There, Sec. 9(c) of the N. I. R. A. was held unconstitutional because it delegated to the President authority to prohibit the transportation of so-called "hot" oil in interstate commerce *without prescribing a sufficient standard to guide and limit the exercise of such delegated power.*

[5]*Panama Refining Co. v. Ryan*, 293 U. S. 388, 420; *Schechter Poultry Corp. v. United States*, 295 U. S. 495.

entirely vague and uncertain. The decision furnishes no criterion by which the facts coming before the Board may be tested for the purpose of determining whether the Board has jurisdiction. Thus, the Board is permitted to fix the limits of its delegated power. Thus, the Board is permitted to exercise power which only Congress may constitutionally exercise.

2. The Effect of the Court's Decision Is to Accord Administrative Finality to the Board's Interpretation of an Act of Congress.

No finality should be given to an interpretation by an administrative body of the language of an act of Congress *unless such act itself expressly delegates that determination to the administrative body.* This distinction is disclosed by a comparison of *Shields v. Utah Idaho R. Co.*, 305 U. S. 177, and *United States v. Idaho*, 298 U. S. 105.

The decision in the instant case declares that in determining the meaning of the word "employee" the "reviewing court's function is limited."[6]

It is respectfully urged that no such limitation should be imposed on a federal court's power and duty to interpret an act of Congress, *in the absence of an express delegation by Congress to the administrative body* of such judicial power. No such express delegation will be found in the National Labor Relations Act.[7]

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[6]Opinion, page 15.

[7]There was such express delegation in the Railway Labor Act (45 U. S. C. A., sec. 151), under which *Shields v. Utah Idaho R. Co.*, 305 U. S. 177, was decided, and under the Bituminous Coal Act (15 U. S. C. A., secs. 833, 834) under which *Gray v. Powell*, 314 U. S. 402, was decided.

3. The Court's Decision mistakenly assumes That Its Interpretation of the Word "Employee" Is the Same Interpretation as That Which the Board Employed.

Reference to the Board's decision of January 9, 1941 (28 N. L. R. B., p. 1006 at 1022, 1023) will disclose that the Board based its conclusions upon an interpretation of the word "employee" *according to the conventionally accepted "control test."* Thus the Board stated: ". . . we are of the opinion that the Companies have the right to exercise, and do exercise, such control and direction over the manner and means in which the newsboys perform their selling activities as establishes the relationship of employer and employee for the purposes of the Act." This was the theory upon which evidence was presented to the Board. The Board did not adopt the interpretation of "employee" prescribed by the Court's decision.

Since the Board professed to employ the "control test" in determining the meaning of the word "employee," that test should have been applied upon a review of its decision. The Board's action must be judged by the standard which the Board itself has invoked; its action must be measured by what it did, not by what it might have done. This, it is respectfully submitted, is the rule of review announced in *Securities Comm'n v. Chenery Corp.*, 318 U. S. 80, 89, 93, 94.

4. The Findings of the Board Were Inadequate to Warrant Its Conclusion That "Employment" Existed, if the Word "Employee" be Given the Meaning Ascribed to It by the Court's Decision.

The Act required findings.[8] To be valid the Board's decision must have been supported by basic findings.

If, as indicated in the decision,[9] "employment" is to be made to depend upon the "economic facts," then it is respectfully urged that there is an absence of findings by the Board disclosing such "economic facts."

For example, the decision declares that "it is not necessary in this case to make a completely definitive limitation around the term 'employee'"; that that task has been "assigned primarily" to the Board; and that the Board's "everyday experience . . . gives it familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers."[10] Certainly there is little or nothing of these matters stated in the Board's findings. As pointed out above (point 3) the Board professed to employ the conventionally

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[8]Section 10(c) of the Act provides that "if upon all the testimony . . . the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board *shall state its findings of fact* . . ."

[9]Opinion, page 12.

[10]Opinion, page 14.

accepted "control test." Hence it was natural that its findings should reflect an attempt to apply the "control test"—not the economic fact rationale of the Court's decision.

Respectfully submitted,

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I, counsel for petitioner herein, certify that the foregoing petition is presented in good faith and not for purposes of delay.

May 10, 1944.

JOHN M. HALL.